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## **Abstract**

In his article, Richard Moon canvasses the two main theories of freedom of expression - one autonomy-based and the other democracy-based - and discusses their impact on the scope of freedom of expression. Concluding that neither theory gives a complete explanation of the freedom, Moon argues for a new theory based on the value of social interaction and community, and discusses how far protection of communication based on such a theory would extend.

# THE SCOPE OF FREEDOM OF EXPRESSION

BY RICHARD MOON\*

*In his article, Richard Moon canvasses the two main theories of freedom of expression — one autonomy-based and the other democracy-based — and discusses their impact on the scope of freedom of expression. Concluding that neither theory gives a complete explanation of the freedom, Moon argues for a new theory based on the value of social interaction and community, and discusses how far protection of communication based on such a theory would extend.*

## I. INTRODUCTION

In several recent decisions the Ontario Court of Appeal has said that the freedom of expression contained in the *Canadian Charter of Rights and Freedoms* extends to protect dance, music, film, painting and other forms of artistic expression.<sup>1</sup> According to the Court, these forms of expression can be restricted by the state, only on reasonable grounds, which are “demonstrably justified in a free and democratic society” — that is according to the requirements set out in Section 1 of the Charter. This is a broad view of the freedom’s scope. Is such a view justified? To answer this question we must examine the basis of the freedom.

Traditionally, two arguments have been made in support of freedom of expression. The first is that the freedom is an important prerequisite to democracy. Protection must be given to any expression which is necessary to the operation of a representative form of government. The second argument is that the freedom must be protected if we are to respect the “autonomy” of the individual. An “autonomous” person

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<sup>1</sup> The Ontario Court of Appeal in *Re Ontario Film and Video Appreciation Society* (1984), 45 O.R. (2d) 80, upheld the decision of the Divisional Court (1983), 41 O.R. (2d) 583, which held that certain provisions of the *Theatres Act* were a restriction on the freedom of expression. The Divisional Court at 590 had said:

It is clear to us that all forms of expression, whether they be oral, written, pictorial, sculpture, music, dance or film are equally protected by the Charter.

In *R. v. Videoflicks* (1984), 48 O.R.(2d) 395, the Ontario Court of Appeal again took a broad view of the freedom. Speaking for the Court, Mr. Justice Tarnopolsky said at 430:

As the Divisional Court held in the *Ontario Film and Video Appreciation Society* . . . freedom of expression under the Charter must extend to all forms of expression.

is one who is free to express himself or herself to others and to receive the communications of others without interference by the state.

Both these theories offer little guidance as to the proper scope of the freedom because neither gives a complete explanation of the freedom. What sort of expression is necessary to the operation of democratic government? If "democracy" means representative government, then only a very narrow category of human expression will fall within the freedom's scope. Representative government can exist in a community where dance, painting and music are subject to censorship. Indeed, representative government can exist where most discussion is proscribed. So long as citizens are able to vote and to communicate with their elected representatives, the government will be representative.

But the term "democracy" sometimes refers to something more than a form of government. It sometimes refers to a social context in which an individual is able to participate in various social goods and to develop as a free and thinking person. If this is what "democracy" means, then the scope of the freedom will be much broader. But, on this view, "democracy" is a complex moral idea about the individual and not simply a form of political organization. Those who justify freedom of expression because it is necessary to the operation of "democratic" government usually define "democracy" as representative government for they see representative government as an uncontroversial goal and a legitimate ground for judicial review. Yet much of the intuitive appeal of their theory draws upon the wider meaning of "democracy."

The term "autonomy" is also defined in different ways. Ordinarily those who see "autonomy" as the justification for the freedom use the term to mean the absence of external barriers to an individual's actions — drawing on the liberal idea that the state ought not to favour one individual's conception of the good over another's. If "autonomy" in this sense is the basis of freedom of expression then the freedom's scope will be very broad indeed — covering every action of the individual. If any form of external restraint is *prima facie* wrong, then no particular category of human action is set apart for special protection. All action must be protected. This is a wide claim for a constitutional right — even one subject to reasonable limits. Those who believe that "autonomy" is the basis of the freedom seldom argue that its scope is this broad.

But often the term "autonomy" refers to a capacity in individuals to make choices and to conduct their lives in a way that is true to their purposes. If freedom of expression is based on "autonomy" in this sense then its scope will be something less than all human actions. Its scope

will extend only to those forms of expression which are of particular significance to the development and exercise of the individual's capacity for intelligent and morally sensitive thought. Much of the appeal of the "autonomy"-based justification of the freedom derives from this second meaning. Yet this meaning is not mentioned in the writings of the "liberal" proponents of this justification.

I will argue that an examination of the claims of both the traditional theories of the freedom's justification points to a third theory. In defending and elaborating the "democratic" and "autonomy"-based theories, the proponents of each draw upon a new and different meaning of the concepts of "democracy" and "autonomy." The proponents of these traditional explanations appeal indirectly to a moral attitude which links individual and community. The value attached to freedom of expression is based on a view that the good of the individual is bound up with the community.

The scope of a freedom justified on these grounds will be no wider and no narrower than the activity we call communication. Communication is the way we interact with others and so participate in social goods such as knowledge, friendship and self-government. As well, through communication the human capacities we value such as thought and feeling are developed. If this is the proper understanding of freedom of expression, then artistic expression will lie within its scope.

## II. FREEDOM OF EXPRESSION BEFORE THE CHARTER

Much pre-Charter case law in Canada supports the view that freedom of expression is important because it contributes to the operation of democratic government. In the pre-Charter period the most important approach to the protection of freedom of expression focused on the distribution of legislative powers between the federal and provincial governments under the B.N.A. Act.<sup>2</sup>

In the *Alberta Press Case*, in 1938, the Supreme Court of Canada decided that the provincial governments did not have legislative jurisdiction to enact a statute which interfered with freedom of expression.<sup>3</sup> The Court struck down the Alberta Government's Bill, "An Act to ensure the Publication of Accurate News and Information." The Bill provided that an official designated by the provincial government could require a newspaper to publish a reply from the government to any statement concerning government policy. The Bill also provided that

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<sup>2</sup> *British North America Act, 1867* (U.K.) 30 & 31 Vict., c.3. Now the *Constitution Act, 1867*.

<sup>3</sup> *Reference re Alberta Statutes*, [1938] S.C.R. 100.

upon request the paper would be obliged to provide particulars of the sources of information for any statement appearing in the paper.

The Supreme Court held that the Press Bill was a restriction of freedom of expression and was therefore beyond the constitutional competence of the province. The Court referred to the preamble of the B.N.A. Act which stated that the Constitution of Canada was to be "similar in principle" to that of the United Kingdom. This meant, said the court, that the Constitution contemplated a system of government based on the popular will. Any abrogation of freedom of public discussion and debate was considered by the court to interfere with the operation of democratic government. As the governing process was a matter of national significance, the restriction of free expression was beyond provincial legislative competence. In the words of Chief Justice Duff:

[I]t is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.<sup>4</sup>

Much the same view was expressed by Mr. Justice Cannon:

Democracy cannot be maintained without its foundation: free public opinion and discussion throughout the nation on all matters affecting the State within the limits set by the criminal code and the common law.<sup>5</sup>

In several judgments made during the 1950's, the Supreme Court restated the reasoning in the *Alberta Press Case*. In *Saumur v. The City of Quebec*, the Court struck down a by-law which prohibited the distribution of any book or pamphlet in the streets of Quebec City without the authorization of the chief of police.<sup>6</sup> In reaching this conclusion Mr. Justice Rand spoke of the importance of free expression to the operation of parliamentary government:

Under the constitution [the B.N.A. Act] government is by parliamentary institutions, including popular assemblies elected by the people at large in both provinces and Dominion: government resting ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under licence, its basic condition is destroyed: the government as licensor becomes disjoined from the citizenry. The only security is steadily advancing enlightenment, for which the widest range of controversy is the *sine qua non*.<sup>7</sup>

Thus, prior to the Charter of Rights, the courts had succeeded in giving significant protection to freedom of expression by prohibiting the provincial governments from placing restrictions on the freedom. The

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<sup>4</sup> *Ibid.* at 133.

<sup>5</sup> *Ibid.* at 146.

<sup>6</sup> [1953] 2 S.C.R. 299.

<sup>7</sup> *Ibid.* at 330.

preamble of the B.N.A. Act which declared that the Canadian constitution was to be similar in principle to that of the United Kingdom provided the textual basis from which the courts were able to derive a limited protection for the freedom. In the Supreme Court's view, the preamble meant that Canada was to be governed by democratic institutions. The operation of these institutions required freedom of discussion of public matters. Freedom of expression, therefore, was a matter of national significance. It could not be restricted by provincial governments, for their jurisdiction was over "local and private" matters.

### III. FREEDOM OF EXPRESSION AND DEMOCRACY

Freedom of expression in the Charter will be interpreted against the background of these earlier cases. What is the scope of the freedom if its justification lies in the requirements of democracy? In the pre-Charter cases, the connection between democracy and freedom of expression was declared but not elaborated. I will argue that the "democratic theory" is inadequate as an explanation of the freedom. In making this argument, it will be helpful to look to the United States where this theory has been the subject of debate.

The most important defence of the "democratic" interpretation of the First Amendment right to free speech is made by Alexander Meiklejohn.<sup>8</sup> Meiklejohn sees democracy in the United States as the result of "something like a social contract" embodied in the American Constitution and free speech as a requirement of "democratic" government or "self-government." From the premise of "democratic" government set out in the American Constitution, the right to free speech follows by deduction. A "democratic" government is one that is responsible to its citizenry and seeks to represent their interests. If a government is to act "democratically," then the people must have an opportunity to formulate views on matters of public importance and to express those views to their political representatives.

For Meiklejohn the advantage of the "democratic" interpretation is that it helps define the limits of the freedom. He realizes that the freedom to speak cannot be unqualified; only speech which is relevant to the processes of government should be protected. Discussion of "public" matters is protected while discussion of "private" matters is not. Within this sphere of "public speech" the freedom is absolute; that is, it cannot be balanced off against other rights or interests.

A more recent statement of the "democratic" argument is made

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<sup>8</sup> A. Meiklejohn, *Political Freedom* (1965).

by John Hart Ely in his book *Democracy and Distrust*.<sup>9</sup> Ely is not as confident as Meiklejohn that the "democratic" interpretation will yield a clear line distinguishing speech which is protected from speech which may be subjected to regulation. He believes that defining the limits of the right involves an imprecise balancing of competing interests. But he also believes that recognizing the democratic basis of the freedom will give a better idea of its scope and of the weight that should be attached to it when it comes into conflict with other interests.

For Ely, however, the real value of the "democratic" interpretation is that it offers a justification for the entrenchment of the freedom against the will of the legislature and for the position of the judiciary as the protectors of the freedom. He argues that the right to free speech is not in conflict with the principles of representative government and majority rule:

[W]hat are sometimes characterized as two conflicting American ideals — the protection of popular government on the one hand, and the protection of minorities from denials of equal concern and respect on the other [including the right of free speech] — in fact can be understood as arising from the common duty of representation.<sup>10</sup>

If government is to be responsive to the interests of its citizens, then those citizens must be able to discuss political matters and to communicate with their political representatives.

Ely argues that appointed and life-tenured judges cannot and should not act as reflectors of conventional values. Detached from the will of the citizenry, judges are unsuited to make value judgments. The legislature is the place where substantive values should be identified and accommodated. But, says Ely, judges are well suited to the role of guardians of the process of representation. The independence of the judiciary does put them

in a position objectively to assess claims . . . that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are.<sup>11</sup>

Ely's "democratic" interpretation of the freedom offers a value-neutral basis for judicial review of government action. And it offers a way of reconciling the right of free speech with the principle of majority rule. The demands of "representation" provide the justification and the standard for judicial intervention.

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<sup>9</sup> J.H. Ely, *Democracy and Distrust* (1980).

<sup>10</sup> *Ibid.* at 86.

<sup>11</sup> *Ibid.* at 103.



But does the idea of "democracy" provide a premise from which we can deduce the sorts of expression that should be protected? What speech must be protected if government is to be truly "representative"? A right to vote is not enough. For a government to be "representative" its citizens must be able to communicate with their elected representatives. But does "representation" require more than this? Does it require that citizens be able to exchange information and ideas about political and moral issues, as both Meiklejohn and Ely believe? A citizen who is exposed to a wide variety of ideas and information will be better informed and have a broader outlook. Meiklejohn includes within the category of protected speech, literature, philosophy, science and fine art. All forms of speech which contribute to the development of "intelligence and sensitivity to human values" in the public are protected.<sup>12</sup> In Meiklejohn's view:

Self-government can exist only in so far as voters acquire the intelligence, integrity and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.<sup>13</sup>

But does "representative" government require an intelligent, value-sensitive population? It would seem to require only that citizens be able to register their preferences with their political leaders, not that these preferences be of a certain quality. A government which carries out the choices of its citizens, even if those citizens are neither intelligent nor value-sensitive, is still a "representative" government. A freedom with the broad scope that Meiklejohn would give to it (speech which contributes to the development of an intelligent and sensitive citizen) or even the narrower scope supported by Ely (political discussion among citizens), is not a condition precedent of "representative" government. The premise of representative government will not yield what is claimed for it.

But Meiklejohn's argument is not so easily set aside. Unlike Ely, Meiklejohn does not focus his argument exclusively on the idea of "representation." The Constitution, he says, establishes "self-government." "Self-government" is more than a system in which the preferences of citizens are represented. Implicit in the notion of "self-government" (of "democratic" government) is a moral idea about the citizen. The citizen has the potential to make informed and intelligent moral and political judgments. Value is placed not simply on the choices made, but also on the capacity to make choices. An environment is "democratic" if it

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<sup>12</sup> A. Meiklejohn, "The First Amendment is an Absolute" [1961] *Supreme Court Review* 245 at 256.

<sup>13</sup> *Ibid.* at 255.

encourages the development of these capacities. Freedom of expression, then, is not a condition precedent of "representative" government; rather it is something which advances the ideal of "self-government" by advancing the capacity of citizens to make intelligent choices.<sup>14</sup>

With this version of the "democratic" theory, democracy is a complex ideal. It rests on a moral view of the individual which attaches value to certain human capacities. If this is what "democracy" means, then Ely's hope for a value-neutral justification and definition of the freedom seems lost. For with this version of the theory, "democracy" is not simply a given from which freedom of expression can be derived deductively. It is, instead, a focus for debate about what is to be valued in a human being and about what speech will advance that which we value.

As well, Meiklejohn's claim that there is a firm line between "public" speech, which is protected, and "private" speech, which is not, is no longer tenable. The "public speech" category has been extended to include all speech which contributes to the development of the citizen as an "intelligent and value-sensitive" person. If the freedom is given such a broad scope, it is unreasonable to think that other values cannot limit it. Limitations in order to protect the values of privacy, reputation, fair trial and so forth seem necessary.

Since the focus of the "democratic" theory has shifted from the process of political representation to the development of capable citizens, the description of the theory as "democratic" is misleading. Freedom of expression matters because it is important to individual development. Individual development may be part of the democratic ideal, but its value does not derive from its contribution to the political process. We do not value "intelligence and value-sensitivity" in the individual because these capacities in some way contribute to the operation of government. Instead, we judge the political process by its contribution to that which we value in human beings.

The "democratic" theory has recognized that freedom of expression and "representative" government are connected, but it has misun-

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<sup>14</sup> Mr. Justice Rand has described the justification for freedom of expression in terms of the capacity of the citizenry for "self-government." In *Switzman v. Elbing*, [1957] S.C.R. 285 at 306, he said:

Whatever the deficiencies in its workings, Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society. . . .

But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulated a capacity in man, acting freely and under self-restraints, to govern themselves; and that advance is best achieved by the individual liberation from subjective as well as objective shackles.

derstood the nature of that connection. The connection is that both freedom of expression and "representative" government advance certain capacities in the individual and certain ways of life. Under "representative" government, individuals are allowed to determine their own interests and to make value judgments. An individual who makes value judgments and who participates in the governing process will experience important human goods and will develop as an intelligent and value-sensitive person. Similarly, in the exercise of free expression, individuals participate in various forms of human good such as friendship and self-government and develop as thinking human beings.

The "democratic" theory, thus, faces a dilemma. If the theory is concerned with the requirements of representative government, then it cannot account for much of the expression which the proponents of the theory have assumed it protects. It cannot justify artistic expression or even political discussion among the citizenry. If the concern of the theory is wider than the requirements of political representation, it may be able to support a wider scope of protection. Its focus, however, will have shifted from the political process to the individual. It will have ceased to be a "democratic" theory and have become a theory about individual right.

In the Canadian context, it is easy to see why freedom of expression came to be linked to the idea of democratic government. Prior to the entrenchment of the Charter of Rights, the Canadian Constitution did not give specific protection to freedom of expression. If the courts were to give any protection to the freedom, they had to find some basis for it in the form of government set out in the Constitution. The courts recognized that the value of an informed and intelligent citizenry was implicit in the choice of a parliamentary form of government. In establishing this form of government, the Constitution could be seen as affirming the values which underlie freedom of expression.

But freedom of expression now has direct constitutional protection. The Charter has given the courts a fresh opportunity to reflect upon the freedom's justification and to define its scope. The freedom need no longer be justified as a requirement of "democratic" government. The values which underlie the freedom should not be concealed behind the apparent value-neutrality of "representative" government.

Adherence to the "democratic" view leaves the freedom vulnerable to conceptual confusion and to the certainty that its scope will be ever narrowed. If "democracy" is the basis of the freedom, why should the will of the majority to restrict free speech be constrained? And why should anti-democratic speech, or even speech unrelated to the political issues of the day be protected? If freedom of expression is to be of use

when it is most needed — in defence of speech which is unpopular with the political majority — then its theoretical basis must be clear.

#### IV. FREEDOM OF EXPRESSION AND AUTONOMY

An important alternative to the "democratic" theory is a theory based on the idea of individual "autonomy." According to this theory, the government is morally bound to respect the "autonomy" (or "liberty") of individuals and may not interfere with their freedom to express themselves to others and to receive the expressions of others.

The term "autonomy" suggests a broad freedom from government interference, one broad enough to include all forms of human action. Is this the proper scope of freedom of expression? Are all human actions to be protected subject only to such reasonable limits as may be demonstrably justified in a free and democratic society? Such a freedom would require the courts to assess the importance of all legislation which restricted an individual's actions, a responsibility which seems beyond their institutional competence.

Are all human actions equally worthy of constitutional protection? Or is there a sub-category of human action which is deserving of special protection? Freedom of expression is entrenched in the Constitution and made the subject of judicial concern because it protects a special category of human action; an activity deserving of judicial protection in a political community that is otherwise governed by majority rule. If freedom of expression does not protect all possible human actions, then what special category of action does it protect?

The proponents of the "autonomy" based theories do not claim that every human act is protected by the freedom. They assume that the freedom protects communication. But why the scope should be limited to acts of communication is not immediately apparent from the term "autonomy."

Thomas Scanlon describes the freedom as:

the consequence of the view that the powers of a state are limited to those that citizens would recognize while still regarding themselves as equal, autonomous, rational agents. . . .

To regard himself as autonomous, a person must regard himself as sovereign in deciding what to believe and in weighing competing reasons for action.<sup>15</sup>

For Scanlon, if individuals are to be "autonomous," they must be free in thought and choice. But individuals are still free to think and make decisions, even if they are not free to communicate their thoughts

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<sup>15</sup> T. Scanlon, "A Theory of Freedom of Expression" in R.M. Dworkin, ed., *The Philosophy of Law* (1977) at 162, 163.

and to receive the benefit of others' thoughts. The state can abrogate the freedom and still an individual is "autonomous" in the sense of being independent in thought and choice. If individual "autonomy" is the basis for freedom of expression, then it must mean something more than independence from others.

By "autonomy" Scanlon does, indeed, mean something more:

An autonomous person cannot accept without independent consideration, the judgment of others as to what he should believe or what he should do.<sup>16</sup>

To be "autonomous," an individual must be treated as capable of making decisions for himself or herself. It is not enough that an individual's thoughts and decision-making processes are free from interference. The government must not prevent him or her from receiving information and ideas from others on the grounds that it believes he or she is not capable of making judgments for himself or herself. In Scanlon's view, freedom of expression does not protect a certain class of expressive acts as valuable in themselves, rather it excludes certain reasons for restricting expression. The government cannot protect an individual from coming to have false beliefs by pre-selecting available information. If the government restricts an individual's access to information and ideas because it does not regard that person as capable of making independent judgments, it will have failed to recognize his or her "autonomy."

Ronald Dworkin's view of free expression is similar to Scanlon's except that Dworkin focuses his concern on the individual speaking rather than the individual listening. In an article discussing freedom of the press, Dworkin suggests several alternatives to those theories of the freedom which focus on the interests of the listener:

Different theories might be proposed: that censorship is degrading because it suggests that the speaker or writer is not worthy of equal concern as a citizen or that his ideas are not worthy of equal respect; that censorship is insulting because it denies the speaker an equal voice in politics and therefore denies his standing as a free and equal citizen; or that censorship is grave because it inhibits an individual's development of his own personality and integrity.<sup>17</sup>

The state must treat the judgments that a citizen makes as "worthy of equal respect." This is so, says Dworkin, because citizens must be treated as "capable of forming and acting upon intelligent conceptions of how their lives should be lived."<sup>18</sup> The state must not favour one individual's conception of the good over another's. To restrict an indi-

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<sup>16</sup> *Ibid.* at 163.

<sup>17</sup> R. Dworkin, "Is the Press Losing the First Amendment?" *The New York Review of Books* (4 Dec. 1980) at 51.

<sup>18</sup> R. Dworkin, *Taking Rights Seriously* (1978) at 272.

vidual's freedom of speech would be to violate this requirement of neutrality, since the grounds for such restriction would be the undesirability or inferiority of the restricted view.

But is it a failure of respect, and a moral wrong, if we do not regard citizens as equally competent or their ideas as equally sensible? Indeed, we criticize the views of some individuals because we believe that those views are mistaken and indicate poor judgment. And while the state may permit free expression of ideas, it does not permit all ideas to be acted upon. Dworkin says that criticism of ideas and restriction of actions are not denials of "equal concern and respect." For Dworkin, the state fails to show individuals the required respect only if it prohibits free expression of their ideas. Yet to criticize an individual's ideas and to prevent that person from acting upon them is to treat his or her ideas as less sensible or worthwhile than those of others. The language of "autonomy" and "respect" does not tell us why anything should turn on the distinction between criticism of ideas and suppression of ideas.

Scanlon's attempt to base freedom of expression on the requirement that we respect the decision-making capacity of the listener is incomplete in the same way. He does not believe that criticizing the decisions individuals make or restricting their freedom to act upon those decisions is wrong. Individuals will make many incorrect decisions, but still they must be allowed the freedom to receive information and to make decisions on the basis of that information. Again "autonomy" does not indicate why criticism of ideas and restriction of action is acceptable while prohibition of the exchange of ideas is not.<sup>19</sup>

Whether we are referring to the "autonomy" of the speaker or the listener, the term "autonomy" refers to, but does not specify, a moral idea about the individual: an idea that accepts that individuals are not all equal in their decision-making capacity, but considers, nevertheless, that they must be permitted to exchange ideas and to exercise their decision-making capacity. Freedom of expression has moral significance. But relying on the opaque language of "autonomy" and "respect," Scanlon and Dworkin do not explain what that significance is.

In *A Theory of Justice*, John Rawls argues that free speech is a

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<sup>19</sup> In fairness to Thomas Scanlon, it should be noted that in a recent article, entitled "Freedom of Expression and Categories of Expression" (1978-79) 40 *U. of Pitts. L. Rev.* 519, he has attempted to explain the freedom in terms of "individual interests." He no longer thinks that "autonomy" is the basis of the freedom. Now he claims that:

[T]he protection to which an act of expression is entitled is in part a function of the value of the larger purposes it serves.

It seems that he now holds an instrumentalist view of the freedom's justification.

requirement of justice.<sup>20</sup> Rawls constructs an "original position" in which "free" and "rational" persons, concerned to further their own interests but denied certain information about themselves, choose the principles which will govern their association. He argues that there are two principles of justice, which the parties in the "original position" would choose. The first principle is: "[E]ach person is to have an equal right to the most extensive total system of basic liberties compatible with a similar system of liberty for others."<sup>21</sup> Freedom of speech is one of the basic liberties.

The "original position" is a construction designed to model a particular conception of the person. The parties' choice of certain principles, Rawls claims, establishes a connection between these principles and the conception of the person which the "original position" represents.<sup>22</sup> The conception of the person contained in the "original position" has two aspects, the "rational" and the "reasonable." The "rational" refers to the motivation of the parties; the "reasonable" refers to the restrictions on available information. The parties are to choose principles which they believe will best advance their "conception of the good." They are, however, behind a "veil of ignorance" and do not know what skills and abilities they have, or what their "conception of the good" is.

The "original position," then, represents a moral view of the person which values the advancement of the "conception of the good" chosen by the person and requires that the person's conception not be treated as more or less worthy of advancement than that of any other person. The parties will choose principles which do not favour one "conception of the good" at the expense of another, but will select a certain distribution of "primary goods." "Primary goods" are "those things that it is rational to want whatever else one wants" on the grounds that they will advance all "conceptions of the good."<sup>23</sup> Rawls claims that freedom of speech is one of the "primary goods" which would be chosen in the "original position." It is rational to want free speech because it is part of a framework which allows individuals to pursue whatever they consider to be "the good life."

But it is far from clear that the parties in the "original position" would agree upon a right to free speech. They would not choose principles which favour one "conception of the good" at the expense of an-

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<sup>20</sup> J. Rawls, *A Theory of Justice* (1971).

<sup>21</sup> *Ibid.* at 60.

<sup>22</sup> J. Rawls, "Kantian Constructivism in Moral Theory" (1978) 78 *J. of Philosophy* 515.

<sup>23</sup> J. Rawls, *supra* note 20 at 92.

other. A right to free speech, however, does just that. Even if it is "rational" for each individual to want a right to free speech for himself or herself, it does not follow that a general right to free speech (a right to free speech for all persons) is rational.<sup>24</sup>

A general right of free speech advances some "conceptions of the good" and constrains others. In protecting freedom of speech we favour speech over silence, interaction over isolation. An individual is not required to speak to others but, if he chooses to, he will be protected from interference. Our belief that his ideas are bad or wrong and our fear that others might believe them are not grounds which will justify restriction of his freedom of expression. Nor is it a ground to restrict his freedom that we find his speech objectionable or offensive and that we do not wish to hear it. Our objections must be supported by reasons which represent significant countervailing interests or values. We cannot be forced to stop and listen to those views, and yet we cannot prevent their frequent intrusion into our lives. The protection of free speech favours those conceptions of the good that involve communication, open discussion and social intercourse. It limits those conceptions that prefer paternalism and social isolation.

The justification for free speech cannot lie as Rawls supposes in its usefulness to all "conceptions of the good." Freedom of expression is justified only if we consider some "conceptions of the good" to be more worthy of advancement than others. In deriving freedom of expression from the "original position," Rawls assumes the greater worth of certain ways of life; but this assumption contradicts his formal argument. The "original position" instead of demonstrating the correctness of certain values is in truth premised on certain values.

Rawls and Dworkin have both suggested an additional justification for freedom of expression. The freedom, they say, is important to an individual's "self-development." Included in Dworkin's enumeration of justifications for freedom of expression is the importance of the freedom to "an individual's development of his own personality and integrity."<sup>25</sup> In Rawls' justification of liberty in general, and free speech in particular, the idea of self-development plays a central role. The parties in the "original position" seek to secure not only what is necessary to achieve their conception of the good, but also what is necessary to advance their capacity to form and revise such a conception.<sup>26</sup> Rawls ac-

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<sup>24</sup> This point is made about Rawl's principle of liberty in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983) at 243.

<sup>25</sup> Dworkin, *supra* note 17 at 51.

<sup>26</sup> J. Rawls, *supra* note 22 at 543.



cepts that "liberty of conscience" (which he defines to include freedom of speech) is one of the social conditions necessary for the development of this capacity.

But why is speech or expression important to an individual's "self-development"? Freedom of expression is said to involve the freedom to speak and listen to others. But an individual who is prevented from speaking or listening to others is still in control of his or her thoughts and decision-making processes. If freedom of expression is necessary to individual development, then that development is not simply self-development. The importance of free expression indicates that others have a role to play in the individual's development, but no explanation of the importance of communication or social interaction to individual development is offered by either Dworkin or Rawls.

Each of the arguments for free expression discussed in this section (Scanlon's "autonomy," Dworkin's "equal concern and respect" and Rawls' "advancement of conceptions of the good") has focused on only one aspect of freedom of expression. Each has focused on the fact that it is a "freedom" — a right not to be interfered with, but none of the arguments has explained the positive dimension of the freedom — what the individual is free to do. Unless freedom of expression is a general right to be free from state interference of every kind, then its justification must include some explanation of the value of the particular activities it protects.

Scanlon, Dworkin and Rawls each assume that the scope of the freedom is limited to the activity known as speech or communication. But none of their explanations of the freedom accounts for the value of communication. If "autonomy" means independence from external interference with any of an individual's activities, then it cannot explain a freedom which offers protection to a limited and special class of activities.

But "autonomy" is often used to mean something other than independence from others. If "autonomy" means a capacity in the individual to make judgments and to give intelligent direction to his life, it can justify the freedom.<sup>27</sup> "Autonomy" in this sense is an ideal which

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<sup>27</sup> I. Berlin, in "Two Concepts of Liberty" in A. Quinton, ed., *Political Philosophy* (1967) at 141, distinguishes two meanings of the word liberty (or autonomy):

Political liberty in this sense [negative liberty] is simply the area in which a man can act unobstructed by others. If I am prevented by other persons from doing what I could otherwise do, I am to that degree unfree . . . . The "positive" sense of the word "liberty" derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind . . . . I wish to be a subject, not an object; to be moved by reasons, by conscious purposes which are my own . . . .

freedom of expression may advance. This "autonomy" is not something that individuals have automatically so long as they are free from external interference in how they choose to conduct their lives. It is something which must develop and which the political community can advance by creating the conditions for its development. It is a complex moral idea which deserves careful examination. Scanlon, Dworkin and Rawls provide no such examination. These writers can go no further than their liberal premises permit. They believe that the political community must not favour a particular way of life and that an individual is a social being by choice and not by nature. Freedom of expression will not fit with these beliefs.

## V. FREEDOM OF EXPRESSION AND COMMUNITY

The "democratic" and the "autonomy"-based theories are incomplete as explanations of freedom of expression and so are unable to settle the limits of its scope. The proponents of each of these theories tried to explain a freedom which they assumed extended to protect "communication." In attempting to account for the special protection of communication, they have altered the original meaning of the central concepts of "democracy" and "autonomy."

When we look closely at both "democratic" and "autonomy"-based theories, we can see that they point to another explanation of the freedom. They suggest that the justification for freedom of expression lies not in the value of "democratic" (meaning representative) government or individual "autonomy" (meaning liberty) but in the value of social interaction. Through communication with one another we experience certain forms of good and we develop fully as human beings.

If we see individual development not as the surfacing of a personality which is already set, but as the growth of certain human capacities, then the significance of the freedom becomes clearer. Through communication we develop as human beings in the capacities we value such as rational thought, moral judgment and emotional attachment. These characteristically human capacities can only develop in society. As C.B. Macpherson notes:

Human society is the medium through which human capacities are developed. A society of some kind is a necessary condition of the development of individual capacities.<sup>28</sup>

If we hold that certain capacities are valuable, it follows that we should not impair their exercise. It also follows that we should try to create an

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<sup>28</sup> C.B. Macpherson, *Democratic Theory* (1973) at 57.

environment in which these human capacities are encouraged to develop.<sup>29</sup> Freedom of expression is an important part of such an environment.

The importance of freedom of expression to individual development explains why we should not prevent individuals from expressing their views or prevent them from hearing the views of others, even when we may properly criticize those views and pass laws which prevent them from being put into effect. Allowing individuals to hear and assess the views of others is no guarantee that they will always make wise decisions, but this freedom is essential if they are to develop as thinking beings capable of making judgments. As Mr. Justice Jackson of the American Supreme Court said, "[t]he danger that citizens will think wrongly is serious but less dangerous than atrophy from not thinking at all."<sup>30</sup>

John Stuart Mill supported freedom of expression on the utilitarian ground that the truth is most likely to emerge in a society that permits the unrestricted exchange of ideas. But in Mill's writing there are frequent suggestions that the freedom may also be justified because consideration of different points of view will cultivate intellect and judgment.<sup>31</sup> This shift in Mill's argument from truth to capacity to recognize truth protects Mill from the standard attacks made against the claim that the freedom is justified because truth is most likely to emerge from its exercise. For there are times when the truth will not emerge from the marketplace of ideas (the general community and particular individuals will make mistakes) and sometimes, with little danger of error, the state can censor certain ideas and protect the individual from coming to hold false beliefs. If truth and only truth is what we value, then censorship is entirely sensible. By censoring false ideas, the state can limit their spread. But if we value the capacity to make judgments about truth then censorship of any idea, true or false, makes no sense.

As well it is essential to the development of individuals that they be allowed to express their views to others. In articulating their ideas, individuals give shape to that which is initially inchoate and confused. In expressing themselves to others they become "individuals" with a particular personality and point of view. As Charles Taylor has observed:

[S]peech [is] the activity by which we gain a kind of explicit self-aware con-

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<sup>29</sup> C. Taylor, *Philosophy and the Human Sciences* (1985) at 194.

<sup>30</sup> *American Communication Association v. Douds* 70 S. Ct. 674 (1939).

<sup>31</sup> J.S. Mill, *On Liberty* (1974) at 97. See also C.L. Ten, *Mill on Liberty* (1980) at 124.

sciousness of things which as such is always related to an unreflective experience which precedes it and which it illuminates and hence transforms.<sup>32</sup>

But communication is valuable in another way. By communicating we participate in certain forms of "human good": knowledge, friendship, self-government and other activities or ways of life that are valuable. Communication or social interaction is an end in itself. By communicating an individual forms relationships and associations with others — family, friends, co-workers, church congregation, countrymen. By entering into discussion with others an individual participates in the development of knowledge and in the direction of the community.

The value attached to freedom of expression, then, is based on a recognition that the good of the individual is bound up with the community. Expression is the way we interact with others and so participate in social goods such as friendship and self-government. And through expression individuals develop their human capacities.

## VI. THE SCOPE OF FREEDOM

What is the scope of the freedom of expression if its justification is the value of human interaction? To this point I have followed most writers on the subject and assumed that the freedom extends to protect communication. In this section, I will argue that this is the freedom's proper scope. "Communication," the act of intentionally making and conveying a representation to someone, is the central form of human interaction and therefore is essential to the advancement of the values which underlie the freedom.

In the United States, several prominent judges and commentators have suggested that the protection given by the First Amendment extends to "speech" and not to "conduct."<sup>33</sup> This distinction was adopted by the Supreme Court of Canada in *Attorney-General for Canada and Dupond v. The City of Montreal*, decided only a few years before the Charter of Rights became part of the Constitution.<sup>34</sup> Speaking for the majority of the Court, Mr. Justice Beetz rejected the claim that the Montreal City Council's temporary ban on street demonstrations was an infringement of freedom of speech and assembly and, therefore, was outside the legislative jurisdiction of the City Council. Mr. Justice Beetz said that:

Demonstrations are not a form of speech but of collective action. They are of the

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<sup>32</sup> C. Taylor, *Hegel and Modern Society* (1978) at 165.

<sup>33</sup> See T. Emerson, *The System of Freedom of Expression* (1970).

<sup>34</sup> [1978] 2 S.C.R. 770.

nature of a display of force rather than an appeal to reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse.<sup>35</sup>

Why did Mr. Justice Beetz think that demonstrations were not a form of speech? He regarded demonstrations as action rather than speech. Since these categories are not mutually exclusive — speech is a form of action — the distinction between them needs further explanation. Did he think that demonstrations do not communicate anything? Such a claim is difficult to accept. A demonstration usually involves a group of people who gather together and use signs and chants to demonstrate their position on a public issue.

Perhaps Mr. Justice Beetz thought that only linguistic communication fell within the scope of the freedom. But even if demonstrations did not involve linguistic communication (and they almost always do), why should the scope of the freedom be limited in this way? Nothing in the justification of the freedom could account for drawing the line here. If linguistic communication is deserving of protection, then there is no reason why other forms of communication should not also be protected. The values advanced by linguistic communication will also be advanced by communication which is non-linguistic.

Indeed, the American courts have long held that “symbolic speech” falls within the scope of the freedom.<sup>36</sup> In the United States, so long as an act is “communicative” it will lie within the freedom’s scope, whether it be the gesturing of a hand or the wearing of an article of clothing. It is worth noting that the phrase “freedom of expression” in the Canadian Charter of Rights indicates even more clearly than the phrase “freedom of speech” in the American Bill of Rights that the scope of the freedom is not limited to linguistic communication. If the act communicates, it ought to fall within the scope of the freedom.

It may be that those who put forward the “speech/action” distinction mean only to make a distinction between communication which is protected under the freedom and communication which is denied protection because it conflicts with another important value.<sup>37</sup> When it is necessary that an act of communication give way to a competing value, the act will be classified as “conduct” rather than “speech” and it will be denied protection under the Charter. But then two issues which

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<sup>35</sup> *Ibid.* at 797.

<sup>36</sup> E.g., *Tinker v. Des Moines School District*, 89 S. Ct. 733 (1969); *Street v. New York*, 89 S. Ct. 134 (1969); *Spence v. Washington*, 94 S. Ct. 2727 (1974); *United States v. O'Brien*, 88 S. Ct. 1673 (1968).

<sup>37</sup> For example, in the *Dupond* case, an act of communication giving way to the demands of physical safety or social order.

should be kept separate are being collapsed — the scope or coverage of the freedom and the grounds for limiting the freedom.

In the Charter of Rights these two issues are kept separate. Freedom of expression is set out in Section 2, while Section 1 permits the placing of limits on the freedom in certain circumstances. In *Re Federal Republic of Germany and Rauca*, the Ontario Court of Appeal recognized the need for a two-step approach.<sup>38</sup> In deciding whether a particular act should be given protection a court should first decide whether the act falls within the scope of the freedom and then it should decide whether there are grounds for limiting the freedom in the particular circumstances.

In his recent book on freedom of speech, Frederick Schauer argues that the First Amendment of the American Constitution protects the freedom to communicate.<sup>39</sup> A communicative act, says Schauer, must have "a communicative intent, a communicated message and a recipient of the communication." According to Schauer "self-expression" is not protected by the freedom. He argues that ambiguity in the word "expression" has led some commentators to overextend the scope of the freedom:

"Expression" on the one hand, can refer to communication and, on the other hand, it can refer to any external manifestation of inner feeling. The existence of these two senses of the word "expression" has created confusion about just what it is that freedom of speech is intended to protect.<sup>40</sup>

Has Schauer distinguished two different senses of the word expression? In distinguishing between communication and self-expression, Schauer has focused on only one side of the communicative process. A communicative act has meaning to those who witness it. They must recognize it as meaningful or significant, as referring to some object, idea or feeling. But a communicative act is also expressive. It expresses a thought, belief or feeling of the communicator. In examining a communicative act we may focus on either of these aspects — the understanding of the listener or the expression of the speaker — but every communicative act has both.<sup>41</sup> With some communicative acts the expressive aspect may appear to dominate: for example, art forms such as dance and music. But so long as these activities are directed to an audience and are intended to be meaningful to that audience, they must be

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<sup>38</sup> (1983), 41 O.R. (2d) 225 at 240.

<sup>39</sup> F. Schauer, *Free Speech: A Philosophical Enquiry* (1982) at 98.

<sup>40</sup> *Ibid.* at 51.

<sup>41</sup> C. Taylor, *Human Agency and Language* (1985) at 218, speaks of the two dimensions of meaningful objects, the "designative" and the "expressive" — what the word designates and what the word expresses.

considered "communicative."

But Schauer is right to point out that, although "expression" is often used to mean "communication," not every act of self-expression amounts to communication. Communication is a sub-category of human action. There are many acts which are "expressive" of a person's thoughts and feelings, but which could not properly be described as "communication."

I would define "communication" in the following way.<sup>42</sup> An act of communication involves both an intention to represent or express some state of affairs or fact and an intention to convey or "communicate" that representation to another person. When people communicate they intend to effect in their audience an understanding of the meaning of their act. In recognizing that a person is attempting to communicate, the audience recognizes that the act is meaningful and endeavours to understand its meaning.

All human actions are "expressive" of the thoughts and feelings of an individual. By their actions, individuals reveal themselves to others.<sup>43</sup> But although all acts may convey information, not all acts are performed with the intention that they "communicate" something. When I strike someone with my fist, I express my hostility towards that person. But in doing this act, my intention is not to "communicate" my hostility (or at least ordinarily that is not my intention). I intend, simply, to injure him. The intended effect is not brought about by having the victim understand the meaning of my act. But sometimes, as when I speak words, I intend to "communicate." The whole point of my act is to convey information to others. I achieve this by getting others to recognize my intention to convey meaning to them.

This distinction between acts which are performed with the intention of communicating something to others and acts which incidentally convey something to others about the actor may be what the proponents of the "speech action" distinction were trying to point to. Burning a draft card with the intention of disrupting the operation of the draft is one thing; it is another to do so with the intention of displaying opposition to the draft. Acts intended primarily to "communicate" ideas, information, thoughts or feelings fall within the scope of freedom of expression.

"Communication" represents a special category of human action

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<sup>42</sup> J. Searle, *Intentionality* (1983). Searle writes in the tradition of Oxford Linguistic Philosophy and draws heavily on the writings of J.L. Austin and H.P. Grice.

<sup>43</sup> E.T. Hall, *The Silent Language* (1973). Sometimes we even say that the actions of an individual "communicate" information about his personality to others.

deserving protection under the Charter. In the preceding section, I argued that the value of social interaction underlies freedom of expression. The freedom is an important aspect of an individual's good and essential to his or her development. Because communication is based on an intention to interact with others — to convey meaning, to share knowledge and form relationships — it is the central form of social interaction. All other public acts are merely expressive of the actor. They tell us something about the actor but are not intended to draw us together in a social relationship. The interaction of individuals and the creation of social relationships is not an incident of "communication," it is the whole point of "communication."

Freedom of expression cannot include all acts of self-expression. Such a broad scope would be contrary to the principles of democratic government. If the freedom included all human actions, then the courts would be faced with the impossible task of reviewing every piece of legislation which restricts an individual's liberty. The courts would have to determine whether such restriction was a "reasonable limit which is demonstrably justified in a free and democratic society." A restriction on action imposed by the legislature would stand only if the court decided that it was necessary. Such a role for the courts would be so intrusive as to bring into question the democratic character of our political system.

As well, if the scope of the freedom were so broadly defined, then a law against jay-walking would violate the freedom no less than a law against distribution of religious or political pamphlets on public street corners. But it is difficult to accept that a law against jay-walking is contrary to a fundamental human right and that its justification should be the subject of careful review by the courts. To extend the freedom's scope in this way would be to dilute its force. We should not lose sight of the special character of acts of communication. The freedom is a recognition that these acts are of particular significance to the development and well-being of the individual. Only certain reasons will justify limiting the freedom to communicate. These reasons must be clear and convincing and they must be consistent with the moral idea which underlies the freedom.

Clearly the freedom is concerned with both the listener and the speaker and not with one or the other as most proponents of the freedom have argued. The freedom protects communication. Communication has two dimensions: the understanding of the listener and the expression of the speaker. The listener benefits from the knowledge that others share with him. In receiving and assessing a variety of information the listener's capacity for thought develops. The speaker, by com-



municating with others, is able to direct the course of his life, participate in certain forms of good and give form to his thoughts.

To say that freedom of expression protects the interests of both listener and speaker means that people must not be prevented from speaking to those who wish to hear their views and also that they must not be prevented from hearing the views that others wish to communicate. It does not mean that individuals may impose their views upon an unwilling audience by forcing others to stop and listen to what they have to say.<sup>44</sup> Nor does it mean that an individual may force others to speak against their will.<sup>45</sup> The values underlying the freedom would not be advanced by the enforcement of social interaction. The development of community, the establishment of human relationships and the development of the individual can only occur through the voluntary interaction of individuals.

This is a broad scope for the freedom. Within it will fall not only the usual forms of communication such as spoken and written language, but also various forms of symbolic communication such as dance, music, painting and sculpture. The characterization of these art forms as communication and their protection under freedom of expression have been controversial matters. Works of art usually do not present ideas for rational consideration. Their significance does not lie in some message that can be translated into ordinary language. But in spite of this, a work of art does show the characteristics of an act of communication.

A work of art is intended to represent or express certain feelings. The artist endeavours to express emotions symbolically. The creation of a work of art is not just a symptom of emotion in the way that blushing is a symptom of embarrassment or laughter a symptom of high spirits.<sup>46</sup> The artist creates a work following reflection, and employing the symbolic conventions of the chosen art form. In painting, for example,

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<sup>44</sup> Of course, as we walk on public streets, we may hear speech that we would prefer not to hear, yet we have no right to silence an unpopular speaker provided he does not engage in any sort of harassment.

<sup>45</sup> Indeed, in Canada and the United States, the courts have interpreted the freedom as prohibiting government from requiring individuals to communicate against their will. *West Virginia Board of Education v. Barnette*, 63 S. Ct. 1178 (1943); *Re Alberta Statutes*, *supra* note 3; *The Gay Alliance Toward Equality v. The Vancouver Sun*, [1979] 2 S.C.R. 435.

The right of the public and press to witness a criminal trial even though the parties involved would prefer that the trial be held *in camera* may be an exception to this. However, the holding of trials in public is necessary for the maintenance of a judicial system which is fair and balanced and which is regarded as such by the public. These considerations rather than considerations of free expression underlie the requirement that trials be held in public.

<sup>46</sup> E.H. Gombrich, *Meditations on a Hobby Horse* (1978) at 57.

colour, line, form and tone have conventional significance.<sup>47</sup>

But the creation of a work of art involves more than an intention to give symbolic representation or expression to emotions. It also involves an intention to convey or communicate that representation or expression to others. By employing the symbolic conventions of a particular art form, the artist indicates to the audience that his work is intended to have meaning. And so the creation of a work of art involves the complex intention which characterizes acts of communication. When people present their work as art they want others to see it as significant or meaningful.

The appreciation of a work of art is often an emotional experience. We sometimes find that a painting or a piece of music strikes us in a particular way and evokes a certain feeling within us. But in part our appreciation of the work flows from a recognition of the artist's intention — even if the work's significance is not exhausted by the artist's intended meaning. The effect of a work of art, emotional or otherwise, is built upon a recognition and understanding of the artist's use of symbol. There is an intellectual and an emotional component to our understanding of a work of art. In the words of Nelson Goodman:

[W]hat we know through art is felt in our bones and nerves and muscles as well as grasped by our minds . . . [A]ll the sensitivity and responsiveness of the organism participates in the invention and interpretation of symbols.<sup>48</sup>

Can pornography be isolated from art as a class of material which is not communication and so is not protected by the freedom? Or is all so-called pornographic material *prima facie* protected and subject only to reasonable limits? Pornography is a hard case for a theory of freedom of expression.

A pornographic representation combines two features: it has a certain intention, to arouse its audience sexually, and also a certain content, explicit representations of sexual material.<sup>49</sup> But are pornographic materials conveyed with the communicative intention — does the purveyor of the material intend the consumer to recognize that something is being communicated? Or is pornography really closer to the sexual act, produced and consumed as a means of stimulation?<sup>50</sup>

The pornographer intends the material to sexually stimulate the consumer. Of course, for pornography to stimulate, the consumer must see the image presented as a representation of something sexual. But it

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<sup>47</sup> H. Read, *The Meaning of Art* (1972) at 50.

<sup>48</sup> N. Goodman, *The Languages of Art* (1976) at 259.

<sup>49</sup> B. Williams, ed., *Williams Report: Obscenity and Film Censorship* (1981) at 103.

<sup>50</sup> F. Schauer, *supra* note 39 at 182.

is not necessary for the consumer of the material to recognize that its creator is attempting to communicate something to him. The consumer does not examine the material to draw out its meaning. The consumption of pornography does not involve the calm reflection required for the appreciation of art; the rational element of interpretation is minimal.<sup>51</sup> If these forms of pornography do not involve the creation and interpretation of meaningful objects, then they do not amount to communication and should not be protected under the Charter.

In support of this argument is the certainty that pornography does not advance the values that underlie the freedom — the development of an individual's capacity for intelligent thought and emotional experience and for establishing relationships with others. Indeed, pornography, by portraying human beings as objects for sensual gratification, may actually inhibit the capacity of the consumer to experience complex emotions and to relate to other individuals.

But it is one thing to postulate a definition for pornography and decide that pornography so defined should not be protected by the freedom of expression and it is quite another to decide which material is pornographic and which is not. Recently, the courts have struck down laws restricting pornography because of the vagueness of the standards used. But it may be that such vagueness is unavoidable. What criteria should the courts or the legislature use to distinguish art, which ought to be protected, from pornography, which ought not to be protected?

While pornography involves the depiction of images for the sole purpose of sexually stimulating the consumer, art strives to explore values and emotions. In art human beings are treated as personalities and not simply objects for sensual gratification. But it is difficult to turn the factors which distinguish art and pornography (the intentions of the creator and consumer and the complexity of the work) into a practical test which can be applied by the courts or by an administrative body. There are no firm lines and there is a risk that any test will be overinclusive in practice. A partial solution might be for the legislature to concern itself only with the most offensive pornography, that which depicts the use of violence against other human beings and has no other purpose than sexual stimulation.

## VII. THE LIMITS OF THE FREEDOM

If we take such a wide view of the freedom's scope then we must

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<sup>51</sup> See generally, J. Finnis, "Reason and Passion: The Constitutional Dialectic of Free Speech and Obscenity" (1967) 116 U. Penn. L.R. at 222.

also take a wide view of the grounds for limiting the freedom. Even though an act falls within the scope of the freedom, it may have to be restricted in the interest of some other value. Section 1 of the Charter recognizes the need for such restriction. Under section 1 the burden of showing that a limitation on the freedom is justified is placed on the person seeking to uphold the restriction. As well, section 1 indicates the standard which must be met before a restriction will be permitted — the restriction must be reasonable and it must be demonstrably justified in a free and democratic society. A balance must be struck between competing values.

“A free and democratic society” does not refer to an objective (external) standard. We cannot assume which countries are “free and democratic” and then regard the restrictions accepted in these countries as justified here; for in order to decide which societies meet this standard, we must first decide what it means for a society to be “free and democratic.” Clearly, “a free and democratic” society is an ideal which the political community must try to advance. We may look to other countries for guidance, but ultimately, a decision as to whether a particular restriction on the freedom is justified will involve a moral judgment by our courts.

The balancing process should take into account the importance of the competing value and the reduction of the opportunity for expression if the restriction were permitted. Noise by-laws and certain property rights protect important privacy interests, usually without cutting deeply into the opportunity for expression. Content based restrictions may be justified when expression is used as an instrument for doing harm. Defamation laws recognize that an individual's reputation is something worth protecting. The crime of conspiracy indicates that communication can be used to plan and carry out criminal acts.

It is sometimes argued that freedom of expression must give way when the interests of unity and stability are threatened by the spread of anti-democratic or anti-social ideas. But the freedom of expression rests upon the belief that an individual must be free to communicate with others even though he sometimes will be in error or sometimes will dissent from views thought to be fundamental and even though those who receive his communication believe his mistaken or anti-social views. If an individual is to participate in the “social goods” and develop as human beings, he must have this freedom.

Is there a point at which the freedom must surrender to the pressing needs of social unity — of “community”? I do not believe there is such a point. “Community,” in the sense of a “sharing of life or of

action or of interests, an associating or coming together,"<sup>52</sup> is a "social good" which develops through the freedom of expression. By protecting voluntary social interaction, the freedom makes social co-operation and unity possible. Unity and social solidarity only exist, in any real sense, when individuals are free to make judgments and direct their lives. If communication were suppressed, the result would be a population which was inhibited in its ability to reflect upon important questions of value and a society which was closed and rigid rather than "free and democratic."

The belief that there is a tension between the value of "community" and freedom of expression rests upon a confusion concerning the word "community." Freedom of expression is a limit upon the power of the state. And so it limits the power of "the community" (the political majority) acting through its political apparatus to prevent an individual from communicating with others. But if we use the term "community" to refer to the voluntary association of individuals or the sharing of particular values and goals by individuals, then the so-called tension between the ideal of "community" and the freedom of the individual dissolves. Freedom of expression is not granted at the expense of "community" or social solidarity. On the contrary, the freedom is essential to the achievement of these ends. Freedom of expression is all about the coming together of individuals and the good that comes with social interaction. The moral significance of the freedom rests upon the social nature of human beings — upon the dependence that each one of us has upon other individuals for the realization of our human qualities.

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<sup>52</sup> J. Finnis, *Natural Law and Natural Rights* (1980) at 135.

